Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HERMAN WILLIAMS,
Petitioner

V.

THE CITY OF GRANITE SHOALS, TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Margaret D. Kennedy
316 W. 12th Street
Suite 307
Austin, Texas 78701
Counsel of Record
for Petitioner

QUESTIONS PRESENTED

1. Whether the laws of the State of Texas, as interpreted by the state courts, violate Article 1, Section 10 of the United States Constitution, in that they impair the obligation of a city to contract with an individual citizen.

PARTIES TO THE PROCEEDING

Petitioner is Herman Williams, who is represented by Margaret D. Kennedy of Kennedy & Associates, 316 W. 12th Street, Suite 307, Austin, Texas 78701. Petitioner was Plaintiff, Appellee and Petitioner in the respective courts below.

Respondent is the City of Granite Shoals, Texas, which is represented by Diane C. Van Helden of Barish & Van Helden, 1409 West Sixth Street, Austin, Texas 78703. Respondent was Defendant, Appellant and Respondent in the respective courts below.

There are no other parties to this proceeding.

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Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Texas entered in this action on July 28, 1994.

OPINIONS BELOW

The judgment of the trial court is not reported. A copy of the trial court's judgment is attached as Appendix A. The decision of the Court of Appeals, Third District of Texas was not published. A copy of the unpublished opinion is attached as Appendix B. The Texas Supreme Court's decision denying Petitioner's Application of Writ of Error is reported at 37 Tex Sup. Ct. J. 1027 (June 25, 1994). (Appendix C). The Texas Supreme Court's decision overruling Petitioner's Motion for Rehearing is reported at 37 Tex. Sup. Ct. J. 1183. (Appendix D).

BASIS FOR JURISDICTION

The final judgment of the Supreme Court of the State of Texas was entered on July 28, 1994. This Court has jurisdiction to review the judgment of the Supreme Court of the State of Texas pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 10

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

STATEMENT OF THE CASE

This is a dispute regarding an employment contract. On June 15, 1987, the city council of the City of Granite Shoals, Texas (hereinafter "the City") voted to appoint Petitioner chief of police. Williams and the City entered into an employment contract where Petitioner was to serve as police chief for, a period of five (5) years, commencing June 28, 1989, and ending June 28, 1994. On June 12, 1990, Petitioner and the City entered into a new contract providing that Petitioner was to serve as police chief for a period of ten (10) years, commencing June 12, 1990 and terminating June 12, 2000.

On June 2, 1992, the mayor of the City notified Petitioner by letter that his contract would be considered in executive session at a council meeting on June 8, 1992, unless Petitioner requested an open session. Petitioner requested an open session. On June 8, 1992, in open session,

the council voted to terminate Petitioner's employment contract, which reads, in part:

> If the City shall so terminate this agreement, the Chief shall be entitled to compensation for 3 months from date of notice of termination. It is further agreed that breach or evasion of the terms of this contract by either party hereto will result in immediate and irreparable injury to the other party and will authorize recourse to injunction and/or specific performance as well as to all other legal or equitable remedies to which such injured party may be entitled hereunder.
>
> Notwithstanding other terms to the contrary herein, the City may terminate the services of the Chief, immediately, without notice and without severance compensation, upon the occurance [sic] of any one of the following:
>
> (a) Conviction of committing a crime of Class B Misdemeanor or above or a Felony.

The city council admitted that if found no cause for terminating Petitioner, but that it wished to terminate his employment anyway.

Petitioner sued the City, alleging, among other things, breach of contract for terminating his employment. After the trial, the jury returned a verdict in favor of Petitioner, finding that the parties to the contract intended section nine to require "cause" before the City could terminate Petitioner's employment and before three months severance pay is payable. The jury further found that, in this case, there was no cause to terminate Petitioner. The jury determined that the City had breached the ten-year contract and awarded Petitioner damages. The trial court rendered judgment on the verdict in favor of Williams.

Respondent appealed the verdict to the Court of Appeals, Third District of Texas. The Court of Appeals reversed the trial court's judgment and rendered judgment for Respondent. The Court of Appeals concluded that, according to Texas law, "the employment contract, if interpreted to include a requirement of "cause" for termination, formed an impermissible restraint on the city council's governmental functions which would render the contract "'void ab initio--a result the parties could not have intended.'" (Appendix B p.6 (citation omitted)). The Court of Appeals held as a matter of law that the only viable construction of the

employment contract was that it was terminable at will. (Appendix B p.6) Petitioner filed a Motion for Rehearing with the Court of Appeals. That motion was denied.

Petitioner Applied for Writ of Error to the Supreme Court of the State of Texas. On June 22, 1994, the Texas Supreme Court denied Petitioner's Application of Writ of Error. Petitioner filed a Motion for Rehearing regarding his Application of Writ of Error, arguing, among other things, that the Court of Appeals' opinion impaired both a city's and an individual's right to contract. Petitioner's Motion for Rehearing was denied on July 28, 1994.

REASONS FOR GRANTING THE WRIT

The basis on which the Texas Court of Appeals made its decision, subsequently upheld by the Texas Supreme Court in its denial of a Writ of Error and Refusal to Reconsider its denial, was that a city could contract with regard to a governmental function solely by an "at will" contract. Clearly this violates the Contract Clause of the U.S. Constitution.

Ever since *Dartmouth College v. Woodward*, 4 U.S. (4 Wheat.) 463, (1819) this Court has established that states could not take action that would ameliorate the contractual commitment of a state entity to another party. Yet that is exactly

what was done in this case. Here, the city (upheld by Court rulings) sought to convert a 10 year employment contract to an at will contract and thus terminate an employee with whom they found no fault. Clearly this was not a contract by which a city had contracted away a governmental function, since the city was to be informed of any information of that police chief had knowledge and the police chief was to report to the City Council and be guided by it. In fact, one of the causes in the Personnel Policies Manuals for which the Chief could be fired for cause was insubordination or refusing to follow instructions or conduct that blatantly reflects unfavorably upon the City. (City of Granite Shoals Personnel and Safety Policies Handbook Adopted by City Council, Ch. 9, § 1(s); General Manual Granite Shoals Police Department § 3.03.002; Appendix E).

This Court, in *United States Trust Co. v. New Jersey*, 421 U.S. 1 (1977), found that the state cannot refuse "to meet its legitimate financial obligation simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *Id.* at 29.

The acts of the courts of the State of Texas in this case did not rise to the level of promoting a significant and legitimate public purpose. In fact, should this rule of law stand within the state, all citizens could suffer irreparable harm. Cities could

not enter binding contracts for financially beneficial long term lease agreements on a governmental function and would thus be relegated to less advantageous short term, "at will" contracts. Small governmental entities would loose competitive advantage with larger entities for quality employees (as would larger entities compared to the private sector) by being unable to provide any job stability as an alternative to greater salaries. Thus, clearly we have here an unjustifiable attempt to merely change the obligation of parties to a private contract.

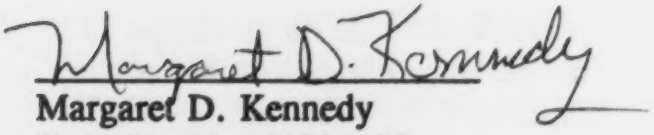
It should also be pointed out that the State of Texas has not reserved the power to modify its contract by either statute or contractual provisions.

Therefore, this Court should set aside the decisions of the appellate courts of the State of Texas in this case as being violative of the U.S. Constitution and leave standing the decision of the trial court and jury.

CONCLUSION

For the foregoing reasons, the petition for of certiorari should be granted.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon Counsel for Respondent this date by depositing three copies hereof in the United States mail, first class postage prepaid.

Margaret D. Kennedy

MARGARET D. KENNEDY

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HERMAN WILLIAMS,
Petitioner

V.

THE CITY OF GRANITE SHOALS, TEXAS,
Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

APPENDIX A
Judgment of the Trial Court

CAUSE NO. 14,583

HERMAN WILLIAMS	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	
	§	
	§	
THE CITY OF	§	BURNET COUNTY,
GRANITE SHOALS,	§	TEXAS
AND MAXINE	§	
THURMAN, JAMES	§	
BALLARD AND	§	
LEONARD HOBBS,	§	
INDIVIDUALLY AND	§	
AS MEMBERS OF	§	33RD JUDICIAL
THE CITY COUNCIL	§	DISTRICT

FINAL JUDGMENT

On January 18, 1993, came on to be heard a jury trial in the above-entitled and numbered cause, wherein HERMAN WILLIAMS is Plaintiff, and THE CITY OF GRANITE SHOALS, AND MAXINE THURMAN, JAMES BALLARD AND LEONARD HOBBS, INDIVIDUALLY AND AS MEMBERS OF THE CITY COUNCIL are Defendants.

Plaintiff appeared in person and through attorney of record Margaret D. Kennedy. Defendants appeared in person and through attorney of record Diane C. Van Helden. A jury having been demanded previously, consisting of twelve good and lawful jurors, was duly impaneled and the case proceeded to trial.

WHEREAS, the court, after hearing the arguments of counsel and the testimony of the parties and of witnesses, and at the conclusion of the evidence, submitted five questions to the jury. It appearing to the Court that the verdict of the jury was for Plaintiff, and against the Defendant City of Granite Shoals, judgment should be rendered upon the verdict in favor of Plaintiff and against the Defendant City of Granite Shoals. The verdict of the jury is shown by the following responses by unanimous vote to the jury questions submitted to them:

1. On June 12, 1990, did the parties intend that Section Nine of the contract required that there be cause for the termination of the contract when three months severance pay is paid?

   ANSWER: Yes.

2. Did the City of Granite Shoals breach the contract of June 12, 1990?

ANSWER: Yes.

3. Was such breach, if any, asked about in Question No. 2, a producing cause of damages to Plaintiff?

ANSWER: Yes.

4. What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Herman Williams for his damages, if any, that resulted from the conduct of the City of Granite Shoals, which you found in your answers to the foregoing question.

Consider the following elements of damages, if any, and none other:

A: Present value, in cash, of the remainder of the contract.

ANSWER: $116,128.00

B: Lost sick pay.

ANSWER: $ 0.00

C: Job search expense.

ANSWER: $2,500.00

5. What is a reasonable fee for the necessary services of Plaintiff, Herman Williams' attorney in this case?

A. For preparation and trial.

ANSWER: $30,000.00

B: For an appeal to the Court of Appeals.

ANSWER: $5,000.00

C: For making or responding to an application for writ of error to the Supreme Court of Texas.

ANSWER: $2,500.00

D: If application for writ of error is granted by the Supreme Court of Texas.

ANSWER: $1,250.00

6. What is a reasonable fee for the services of Defendant, City of Granite Shoals' attorney in this case?

A: For legal services in the preparation and trial of this cause.

ANSWER: $37,1500.00

B: For legal services for an appeal to the Court of Appeals.

ANSWER: $5,000.00

C: For legal services for making or responding to an application for writ of error to the Supreme Court of Texas.

ANSWER: $2,500.00

D: For legal services for an appeal to the Supreme Court of Texas in the event an application for writ of error is granted.

ANSWER: $1,250.00

IT IS THEREFORE ORDERED AND DECREED by the Court that Plaintiff is awarded the following judgment against Defendant City of Granite Shoals:

$116,128.00 and $2.590.00 in damages, plus prejudgment interest of 10% per annum from

July 15, 1992, to January 18, 1993, amounting to $6,077.65 and post judgment interest at the rate of 10% per annum from January 21, 1993, until paid.

$30,000.00 attorney's fees through trial of this case, plus post judgment interest of 10% per annum from January 21, 1993 until paid; $5,000.00 if an appeal is taken to the Court of Appeals, $2,500.00 if a writ of error to the Supreme Court is applied for, $1,200.00 if the writ is granted.

All writs and processes for enforcement for collection of $155,908.00 plus post judgment interest may issue as necessary.

All other relief not expressly granted herein is denied.

SIGNED this _____ day of_____
_____, 1993.

/s/ DV Hammond
Judge Presiding

APPENDIX B
Judgment of the Third District Court of Appeals

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,

AT AUSTIN

JUDGMENT RENDERED MARCH 2, 1994

NO. 3-93-263-CV

THE CITY OF GRANITE SHOALS
V.
HERMAN WILLIAMS
APPEAL FROM 33RD DISTRICT COURT
OF BURNET COUNTY
BEFORE CHIEF JUSTICE CARROLL,
JUSTICES ABOUSSIE AND B. A. SMITH
REVERSED AND RENDERED

--

PER CURIAM OPINION

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was error in the trial court's

judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby reversed, and judgment be and is hereby rendered that appellee take nothing. It is FURTHER ordered that the appellee pay all costs relating to this appeal both in this Court and the court below; and that this decision be certified below for observance.

IN THE COURT OF APPEALS,
THIRD DISTRICT
OF TEXAS,
AT AUSTIN

NO. 3-93-263-CV

THE CITY OF GRANITE SHOALS,
APPELLANT

vs.

HERMAN WILLIAMS,
APPELLEE

FROM THE DISTRICT COURT
OF BURNET COUNTY,
33RD JUDICIAL DISTRICT

NO. 14,583, HONORABLE D.V. HAMMOND,
JUDGE PRESIDING

PER CURIAM

This is an appeal from a jury verdict awarding damages in a suit for breach of an employment contract. After a trial on the merits, the jury found that appellant City of Granite Shoals ("the City") had breached a ten-year employment contract with its chief of police, appellee Herman Williams. The trial court rendered judgment on the verdict and the City appealed. In five points of error, the City argues the trial court erred in denying its motion for judgment *non obstante veredicto* because (1) the contract as interpreted by the jury is void and unenforceable; (2) there is legally insufficient evidence to support the jury's finding that the contract required "cause" for termination; and (3) even if "cause" were required, the failure to find that cause existed was against the great weight and preponderance of the evidence. The City further argues the trial court erred in ruling that the contract was ambiguous and in submitting certain damage elements to the jury. By cross-point, Williams argues the trial court erred in refusing to submit issues to the jury regarding violation of his right to due course of the law under the Texas Constitution. We will reverse the trial court's judgment and render judgment for the City.

BACKGROUND

The City was a Type-B general law city until January 14, 1991, when it became a Type-A general law city. On June 15, 1987, the city

council voted to appoint Williams to the position of chief of police. Williams and the City entered into an employment contract for Williams to serve as police chief "for a period of five (5) years, commencing June 28, 1989, and terminating June 28, 1994, subject, however, to prior termination as hereinafter provided." On June 12, 1990, the same parties entered into a new contract in which Williams was to serve as police chief "for a period of ten (10) years, commencing June 12, 1990, and terminating June 12, 2000, subject, however, to prior termination as hereinafter provided."

On June 2, 1992, the mayor of the City notified Williams by letter that his contract would be considered in executive session at a council meeting on June 8, 1992, unless Williams requested an open session. Williams requested an open session, and on June 8th the council voted to terminate Williams' employment pursuant to section nine of Williams' employment contract which reads:

> If the City shall so terminate this agreement, the Chief shall be entitled to compensation for 3 months from date of notice of termination. It is further agreed that breach or evasion of the terms of this contract by either party hereto will result in immediate and irreparable injury to the other party

> and will authorize recourse to injunction and/or specific performance as well as to all other legal or equitable remedies to which such injured party may be entitled hereunder.
>
> Notwithstanding other terms to the contrary herein, the City may terminate the services of the Chief, immediately, without notice and without severance compensation, upon the occurance [sic] of any one of the following:
>
> (a) Conviction of committing a crime of Class B Misdemeanor or above or a Felony.

Williams sued the City, alleging, among other things, breach of contract for terminating his employment. After trial, the jury returned a verdict in favor of Williams, finding that the parties to the contract intended section nine to require "cause" before the City could terminate the chiefs employment and before three months severance pay is payable. The jury found the City had breached the ten-year contract and awarded Williams damages. The trial court rendered judgment on the verdict in behalf of Williams.

STANDARD OF REVIEW

"A judgment *non obstante veredicto* is proper only if there is no evidence supporting the jury's findings." *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 590 (Tex. App.--Texarkana 1992, no writ) (citations omitted); *see Fenwal, Inc. v. Mencio Sec., Inc.*, 686 S.W.2d 660, 663 (Tex. App.--San Antonio 1985, writ ref'd n.r.e.). A trial court may render a judgment n.o.v. "if a directed verdict would have been proper." Tex. R. Civ. P. 301. When reviewing a trial court's denial of a motion for judgment n.o.v., the appellate court must examine the evidence in the light most favorable to the jury's verdict, considering only the evidence and inferences that support the verdict and disregarding all contrary evidence and inferences. *Wal-Mart Stores*, 833 S.W.2d at 590; *Fenwal*, 686 S.W.2d at 663. "If there is any probative evidence supporting the verdict, the no evidence point must be overruled." *Wal-Mart Stores*, 833 S.W.2d at 590 *(citing Southern States Transp., Inc. v. State*, 774 S.W.2d 639, 640 (Tex. 1989)).

DISCUSSION AND HOLDING

In its first point of error, the City contends that the jury's finding that the parties to the employment contract intended to require "cause" for termination renders the contract unlawful, void and

unenforceable. The City argues that unless the contract is interpreted as terminable at will, it violates a city ordinance ("Ordinance 35") in existence at the time of the contract and restricts the free exercise of governmental power under state law. The record reflects that the purpose of Ordinance 35 was to create a police department headed by an appointed chief of police to serve a one year term at the will and pleasure of the City. Williams responds that the alleged Ordinance 35, even if validly enacted, was never properly codified and therefore cannot be used to invalidate the employment contract. Williams further argues that, even if Ordinance 35 were valid at the time of the contract, the City is estopped from asserting the ordinance as a defense because Williams detrimentally relied on his contract. Williams' legal position is conflicting. On the one hand, he claims the ordinance creating the department and establishing the office of chief of police was invalidly enacted; on the other hand, he claims a contractual right to serve in that official capacity for ten years.

In any event, the City is a municipal corporation. As such, its hiring and firing of city employees is a governmental function. *See City of Dallas v. Moreau*, 718 S.W.2d 776, 779 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.) (*citing Kelly v. Galveston County*, 520 S.W.2d 507, 512 (Tex. Civ. App.--Houston [14th Dist.] 1975, no

writ) and *State ex rel. Gallagher v. Kansas City*, 319 Mo. 705, 7 S.W.2d 357, 361 (1928)). The operation of a police department is also a governmental function. *See Cronen v. Nix*, 611 S.W.2d 651, 653 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.), *cert. denied*, 454 U.S. 833 (1981) (*citing Ellis v. City of W. Univ. Place*, 171 S.W.2d 178 (Tex. Civ. App.--Galveston), *aff'd*, 175 S.W.2d 396 (Tex. 1943)). A municipal corporation cannot, "by contract or otherwise, bind itself in such a way as to restrict its free exercise of . . . governmental powers, nor could it abdicate its governmental functions, even for a 'reasonable time'. . . . " *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 391 (Tex. 1977) (citations omitted); *see City of Brenham v. Brenham Water Co.*, 4 S.W. 143, 152 (Tex. 1887); *Sayles v. City of Abilene*, 290 S.W. 239, 243 (Tex. Civ. App.--Eastland 1926), *aff'd*, 295 S.W. 578 (Tex. Common App. 1927, judgm't adopted). *But see Gillam v. City of Fort Worth*, 287 S.W.2d 494, 499 (Tex. Civ. App.--Fort Worth 1956, writ refd n.r.e.) (upholding a ten-year contract between a city and a town in which the city agreed to furnish water to the town). As one Texas court of appeals has stated:

> Functions such as the exercise of the police power by which [a municipal corporation] promotes or protects the general welfare, comfort and

> convenience of the people. . . . or enacts legislation under which the peace and good order of society is regulated, are governmental functions over which the governing body must retain exclusive control. These cannot be delegated nor bartered away *and any effort to do so or any contract which has the effect of passing them to others or tying the city's hands so that it is impotent to change its policy in respect thereto is unconstitutional and void.*

City of Crosbyton v. Texas-New Mexico Utils. Co., 157 S.W.2d 418, 420 (Tex. Civ. App.--Amarillo 1942, writ ref'd w.o.m.) (citations omitted) (emphasis added).

In *Clear Lake*, the supreme court held that a contract of indefinite duration between a utility and the city water authority, giving the utility the exclusive right to provide water and sewer service to landowners within a certain 100-acre tract, was terminable at will because the water authority could not restrict the free exercise of its governmental powers. In *Brenham*, the supreme court held that a city ordinance granting a water company the exclusive privilege to supply water to the city for twenty-five years was an invalid restriction on the

municipality's governmental functions. The court reasoned:

> Municipal officers hold but for short terms, those of the city of Brenham for but one year, and the very purpose for which short terms of office and frequent elections are required is to leave the control of municipal affairs as near as may be in the hands of the people; to make the municipal administration reflect, as near as may be, the will of the public. The reasons but emphasize the necessity for denying to a city council, or other governing body, the power, by contract or otherwise, to disable or hinder from time to time the full and free exercise of any power, legislative in its character, which the legislature has deemed proper to confer upon such corporations.

Brenliam, 4 S.W. at 152.

In its order of partial summary judgment, the trial court found that the contract was ambiguous as a matter of law. A basic tenet of contract law is that "[if] two constructions are possible, a construction rendering the contract

possible of performance will be preferred to one that renders its performance impossible or meaningless." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984) (*citing Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 115 (Tex. 1979)); *see Cecil v. Zivley*, 683 S.W.2d 853, 858 (Tex. App.--Houston [14th Dist.] 1984, no writ). Furthermore, this Court will "adopt the construction of the contract which comports with legality, if the contract is susceptible of more than one reasonable interpretation." *Cecil*, 683 S.W.2d at 858 (*citing Conte v. Greater Houston Bank*, 641 S.W.2d 411 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.)).

Following the analysis of the foregoing courts, we conclude that the employment contract, if interpreted to include a requirement of "cause" for termination, formed an impermissible restraint on the city council's governmental functions which would render the contract "void ab initio--a result the parties could not have intended." *Clear Lake*, 549 S.W.2d at 391.

We hold as a matter of law that the only viable construction of the employment contract is that it was terminable at will. Accordingly, the trial court erred when it denied the City's motion for judgment n.o.v.[1] The City's first point of error is sustained. Based on this holding, we need not

address the City's second, third, fourth, and fifth points of error.

By cross-point, Williams argues that the trial court erred in refusing to submit certain issues to the jury regarding the violation of his right to due course of the law under the Texas Constitution. Tex. Const. art. I, § 19. Specifically, Williams alleges that the City failed to follow certain police department personnel policies and state statutes in terminating Williams' employment, thereby denying him procedural due process under Article I, § 19 of the Texas Constitution. Tex. Const. art. I, § 19. Williams seeks money damages for the alleged violations.[2]

Termination of a person's employment is not a violation of that person's procedural due process rights under the state constitution unless that person has a legitimate property" interest in his employment. *See Price v. City of San Marcos*, 744 S.W.2d 349, 351 (Tex. App.--Austin 1988, writ denied), *cert. denied*, 488 U.S. 961 (1988); *see also Hamilton v. City of Wake Village*, 593 F. Supp. 1294, 1296 (E.D. Tex. 1984). "'[A]n officer's interest in his [appointed] position, though not 'property' in the conventional sense, is a recognizable interest for purposes of . . . due process analysis.'" *Price*, 744 S.W.2d at 351 *(citing Tarrant Co. v. Ashmore*, 635 S.W.2d 417, 423 (Tex.), *cert. denied*, 459 U.S. 1038 (1982)). Once

such a property interest is shown, the deprivation of that interest requires notice and an opportunity to be heard. However, "[t]he type of notice and hearing required varies according to the facts of the situation." *Id.*

Williams argues that the City did not meet the notice and hearing requirements set forth in certain police department personnel policies and in section 22.077 of the Local Government Code. *See* Tex. Loc. Gov't Code Ann. § 22.077 (West 1988). We disagree.

Regarding the police department personnel policies, Williams argues that the City failed to comply with section 3.04.007 of the policy manual in terminating Williams' employment. After reading section 3.04.007, entitled "Resulting Action," it is clear that it does not apply to Williams' termination in the instant cause.[3] Accordingly, we find no merit to Williams' argument that the City violated his due process rights in failing to follow the termination procedures set forth in the manual.

Next, Williams argues that based on section 22.077 of the Texas Local Government Code,[4] the city council violated his rights because under subsection (a), the City did not provide him with notice and an opportunity to be heard regarding the termination of his employment contract, and

because under subsection (b), the council did not meet the two-thirds vote requirement.

Williams' argument that his was terminated without sufficient notice and opportunity to be heard is without merit. Section 22.077(b) of the Local Government Code states that the governing body may remove an officer they have elected "at any time." Tex. Loc. Gov't Code Ann. § 22.077 (b) (West 1988). Subsection (b) does not contain the notice and hearing requirements of subsection (a), which pertains to termination for "cause." *See* Tex. Loc. Gov't Code Ann. § 22.077 (West 1988). Furthermore, when a city official's termination is "purely a policy decision and [does] not require the determination of adjudicative facts" he is not entitled to a trial-type hearing. *Price v. City of San Marcos*, 744 S.W.2d at 351 (citation omitted). Williams concedes that the City notified him of the city council meeting but argues that notice was insufficient because it merely stated that his employment contract would be "considered" and that the removal of some city officials would be discussed. Furthermore, it is clear from the record that the city council gave Williams, as well as several members of the public, a chance to speak at the meeting.

We conclude that the City gave Williams sufficient notice and opportunity to be heard. *See Price*, 744 S.W.2d at 351-52 (holding that a city's

termination of an appointed city official did not violate his procedural due process rights when he was given notice of the city council meeting where his removal would be discussed and where he could respond, because there were no adjudicative facts to determine prior to the removal). Accordingly, we hold the City did not violate Williams' procedural due process rights under the Texas Constitution.[5]

We overrule Williams' cross-point. Accordingly, we reverse the trial court's judgment and render judgment for the City that Williams take nothing.

Before Chief Justice Carroll, Justices Aboussie and B. A. Smith
Reversed and Rendered
Filed:. March 2, 1994

Do Not Publish

ENDNOTES

1. Williams asserts on appeal that the City is estopped "from asserting the defense of Ordinance 35" in arguing the contract is invalid because Williams detrimentally relied on the contract and because the city "made no efforts to codify its ordinance . . . ." In

light of our opinion, we need not address this argument.

2. Because we dispose of this point on either grounds, we do not address the City's argument that a cause of action for damages does not exist for violations of rights under the Texas Constitution.

3. The sections immediately preceding section 3.04.007 refer to investigations of police department employees based on written complaints by citizens or other department members. Section 3.04.004 states that the Chief of Police is responsible for the investigation of all complaints. Section 3.04.007 then states:

   A. When the investigation is completed, the Chief of Police notifies the accused of the result.

   B. When the complaint is classified as sustained:

      1. The immediate supervisor of the accused submits a recommendation concerning appropriate disciplinary action, which may be in the form of:

a. Oral or written reprimand.

b. Temporary suspension for a set period of time.

c. Indefinite suspension.

d. After one (1) verbal warning, and one (1) written warning, the employee may be dismissed. If the violation is of a very serious nature, dismissal may occur immediately without oral or written warnings.

2. Final decision for all disciplinary action lies with the Chief of Police.

4. Section 22.077, entitled "Removal of Municipal Officers" states:

(a) The governing body of the municipality may remove a municipal officer for

> incompetency, corruption, misconduct, or malfeasance in office after providing the officer with due notice and an opportunity to be heard.
>
> (b) If the governing body lacks confidence in a municipal officer elected by the governing body, the governing body may remove the officer at any time. The removal is effective only if two-thirds of the elected aldermen vote in favor of a resolution declaring the lack of confidence.

Tex. Loc. Gov't Code Ann. § 22.077 (West 1988).

5. Although Williams alleges in his brief that the city council did not meet the two-thirds vote requirement of section 22.077(b), he does not cite us to any part of the record as evidence of this allegation. "The court of appeals is under no duty to make an independent search of the statement of facts and exhibits for evidence supporting [an] Appellant's contention, *Saldana v. Garcia*, 155 Tex. 242, 285 S.W.2d 197 (1955), and

we decline to do so here." *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343, 351 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.). Furthermore, Williams does not complain that his termination was ineffective, but rather that his due process fights were violated. Because Williams does not raise any arguments addressing the effectiveness of his termination or any other rights affected by the allegedly defective vote, we do not address them here.

APPENDIX C
Supreme Court of Texas' Order Denying
Application for Writ of Error

THE SUPREME COURT OF TEXAS
P. 0. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 22, 1994

Ms. Margaret D. Kennedy
Kennedy & Associate
316 W. 12th
Suite 307
Austin, TX 78701

Ms. Diane C. Van Helden
Barish & Van Helden
1409 West Sixth Street
Austin, TX 78703

RE: Case No. 94-0438

Style: HERMAN WILLIAMS
v. THE CITY OF GRANITE SHOALS

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by /s/ Gene Burns
Gene Burns, Deputy

APPENDIX D -
Supreme Court of Texas' Order Overruling
Motion for Rehearing

THE SUPREME COURT OF TEXAS
P. 0. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

July 28, 1994

Ms. Margaret D. Kennedy
Kennedy & Associate
316 W. 12th
Suite 307
Austin, TX 78701

Mr. Robert R. Graves, Jr.
Kennedy & Associate
316 W. 12th Street
Suite 307
Austin, TX 78701

Ms. Diane C. Van Helden
Barish & Van Helden
1409 West Sixth Street
Austin, TX 78703

RE: Case No. 94-0438

Style: HERMAN WILLIAMS
v. THE CITY OF GRANITE SHOALS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By: /s/ Mia Zierlein
Mia Zierlein, Deputy Clerk

APPENDIX E
Personnel Policies

CITY OF GRANITE SHOALS
PERSONNEL AND SAFETY
POLICIES HANDBOOK
ADOPTED
BY
CITY COUNCIL

CHAPTER 9

DISCIPLINE

Section 1. Work Rules.

The following work rules and guidelines are established for employees of the City of Granite Shoals to serve as minimum standards of employee performance and to set forth an orderly and reasonable approach to the management of employee behavior. Foremen are charged with the responsibility for enforcing these rules and guidelines within their respective departments.

The following behavior on the part of employees of the City will result in disciplinary action up to, and including, dismissal by the foreman or the Mayor.

a. Falsification of records.

b. Repeated tardiness or unauthorized absence. Absence for three (3) consecutive working days without notification or without satisfactory reason will be considered a voluntary termination.

c. Repeated failure of employees to report to their work place at the beginning of their work period.

d. Loafing or carelessness.

e. Sleeping on the job.

f. Excessive visiting with other employees or having unauthorized visitors during working hours.

g. Interfering with another employee's work.

h. Violation of safety policies and procedures.

i. Failure to report an accident involving an on-the-job injury, or damage to City property.

j. Horseplay, disorderly conduct, abuse of the public, unnecessary rudeness, or use of abusive language.

k. Fighting, provoking a fight, or attempting bodily harm or injury to another employee or to any other individual.

l. Abuse of City equipment or materials.

m. Possessing, drinking, or being under the influence of intoxicants while on the job.

n. Soliciting, collecting money; circulating petitions on City property at any time without the express written permission of the Mayor.

o. Engaging in partisan political activity during working hours or actively taking part in political campaigns for elected positions in the City.

p. Using City telephones for personal calls without permission (except in an emergency) or charging personal calls to the City.

q. Theft, dishonesty, or destruction of City property.

r. Unauthorized personal use of City vehicles, equipment and/or facilities.

s. Insubordination or refusal of an employee to perform designated work where such instructions or work normally and properly may be required of an employee.

t. Inadequate work performance or failure to follow clear instructions due to incompetence, inefficiency or negligence.

u. Gross misconduct or behavior unacceptable to the City or to the community at large.

v. Employee error which is threatening to life or could result in significant property loss.

w. Conviction of a felony, to be considered individually.

x. Abuse of rest breaks.

y. Using City property, supplies, or equipment for personal business or benefit.

z. Acceptance of any valuable consideration which was given with the expectation of influencing the employee in the performance of his duties.

aa. Failure to maintain a valid current Texas Driver's License of appropriate classification.

bb. Failure to maintain a motor vehicle driving record (MVR) in accordance with the "MVR Guidelines" established within Chapter 8, Section

2, if employed in a position that requires operation of City vehicles and/or equipment.

GENERAL MANUAL
GRANITE SHOALS POLICE DEPARTMENT

By The
Management Services Section
Field Services Division
Texas Commission on Law Enforcement
Officer Standards and Education

August 1987

3.03.002 CAUSE OF DISCIPLINARY ACTION

Employees are subject to disciplinary action for the following acts of misconduct:

A. Commission of any criminal offense.

B. Neglect of duty or cowardice.

C. Conduct that blatantly reflects unfavorably upon the employee, the department, or the City.

Supreme Court, U.S.
FILED
FEB 7 1995
OFFICE OF THE CLERK

No. 94-1200

In The

Supreme Court of the United States

October Term, 1994

HERMAN WILLIAMS,

Petitioner,

v.

THE CITY OF GRANITE SHOALS, TEXAS,

Respondent.

Petition For Writ of Certiorari
To The Supreme Court of Texas

BRIEF IN OPPOSITION

DIANE C. VAN HELDEN
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Attorneys for Respondent

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OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Does this Court have jurisdiction to entertain a petition for writ of certiorari seeking review of the denial of an application for writ of error to the Texas Supreme Court where Petitioner failed to present a federal question for decision in the state courts and where the decision of the federal question was not necessary to the determination of the cause?

Is Article 1, Section 10, clause 1 of the United States Constitution implicated where a contract is construed so that it is capable of performance and not void *ab initio* under the settled law of the State of Texas?

Is Article I, Section 10, clause 1 of the United States Constitution (the "contract clause") implicated where no legislation has been enacted after the date of formation of a contract?

Is Article I, Section 10, clause 1 of the United States Constitution (the "contract clause") implicated where the contract is impaired not by the result of legislation enacted after its formation but by judicial interpretation of the terms of the employment contract to make it possible of performance?

LIST OF PARTIES

PETITIONER:

Herman Williams

COUNSEL FOR PETITIONER:

Margaret D. Kennedy, Esq.
312 West 12th Street
Suite 307
Austin, Texas 78701
(512) 480-8300

RESPONDENT:

The City of Granite Shoals, Texas

COUNSEL FOR RESPONDENT:

Diane C. Van Helden
BARISH & VAN HELDEN
1409 West Sixth Street
Austin, Texas 78703
(512) 477-9058

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A. Williams has not shown and cannot show a timely, properly raised federal question ... 3

B. Williams has not shown and cannot show that a federal question was adjudicated below as the decision of the Texas Supreme Court rested solely on state law 4

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II. Article I, Section 10, clause 1's prohibition on a State's passing of laws which impair the obligation of contracts is not implicated in this case in that the Texas courts' construction of William's employment contract with the City of Granite Shoals made the contract possible of performance instead of void as violating public policy. 6

III. Article I, Section 10, clause 1 of the United States Constitution (the "contract clause") is not implicated where no legislation has been enacted after the date of formation of a contract 7

IV. Article I, Section 10, clause 1 of the United States Constitution (the "contract clause") is not implicated where the contract is impaired not as a result of legislation but by judicial interpretation of the terms of the employment contract to make it possible of performance 7

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No. 94-1200

In The

Supreme Court of the United States

October Term, 1994

HERMAN WILLIAMS,

Petitioner,

v.

THE CITY OF GRANITE SHOALS, TEXAS,

Respondent.

Petition For Writ of Certiorari To The Supreme Court of Texas

BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari to review the denial of Petitioner's Application for Writ of Error to the Supreme Court of Texas of the judgment rendered on March 2, 1994, by the Court of Appeals for the Third District of Texas.

OPINIONS BELOW

Respondent relies upon Petitioner's recitation of the opinions below.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C.A. § 1257 (West 1993) as asserted by Petitioner. Neither the Texas Supreme Court nor the Court of Appeals for the Third District of Texas were presented a federal question for review and their decisions are based exclusively on settled Texas law regarding the construction of contracts.

STATEMENT OF THE CASE

Petitioner accurately recites the proceedings in the Texas courts. Respondent supplements Petitioner's Statement of the Case only to point out that no federal question was presented at any stage of the proceedings and was not determinative of the case below.

Petitioner's suit went to trial on his Second Amended Original Petition. Therein, he presents only state common law and Texas Constitutional claims. Only petitioner's breach of contract claim was submitted to the jury, his other claims having been decided adversely to him in earlier rulings.

Respondent appealed the denial of its Motion for Judgment *Non Obstante Veredicto* to the Texas Court of Appeals, and the only matter raised by Cross-Appeal was Petitioner's objection to the trial court's refusal to submit to the jury his requested questions concerning his Texas Constitutional claim. App. 1-3. No mention of a federal contract clause argument is made in Petitioner's Motion for Rehearing. App. 4-6.

On application for writ of error to the Texas Supreme Court and in his Motion for Rehearing therein, Petitioner relied exclusively on state law arguments. App. 7-9. The first mention of Article I, Section 10, clause 1 of the United States Constitution comes in William's Petition for Writ of Certiorari in this Court.

REASONS TO DENY THE PETITION

I.

The Court is without jurisdiction to entertain the Petition for Writ of Certiorari as the Petitioner wholly failed to raise a federal question in the courts below and the Texas Supreme Court did not render a judgment or decree in which the issue of whether the lower court's construction of a contract for employment violated the contract clause, Article I, Section 10, clause 1 of the United States Constitution.

This Court lacks jurisdiction under 28 U.S.C.A. § 1257, because the Texas Supreme Court did not consider the federal question of whether the construction given Petitioner's employment contract violated the prohibition that States may not pass laws which impair the obligation of contracts. The issue was never before the Texas courts which considered Petitioner's case.

A. Williams has not shown and cannot show a timely, properly raised federal question.

Rule 14.1(h) of the Supreme Court Rules requires that a federal question be "timely and properly raised so as to give this Court jurisdiction to review the judgment on a

writ of certiorari." Williams does not specify or even mention in his Petition at what stage of the proceedings in the Texas courts he raised his contracts clause argument. Nor does he suggest how these courts passed on this argument or point the Court to the specific parts of the record in which his argument is brought to the attention of the Texas courts. The reason he does not is that the issue is first raised in his Petition for Writ of Certiorari.

Section 1257 jurisdiction is dependent on an affirmative showing from the record that a federal question was "presented for decision to the highest state court having jurisdiction" and that that Court's decision of the federal question was "necessary to the determination" of the case. *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937). Neither requirement is met by Petitioner who relies on the assertion that this Court has "jurisdiction to review the judgment of the Supreme Court of the State of Texas pursuant to 28 U.S.C. § 1257" regardless of whether the federal question was raised or was determinative of the outcome of the case. Petition, p. 1.

Having failed to raise the federal question in the Texas Supreme Court which he now seeks to have this Court determine, Williams' Petition should be dismissed for want of jurisdiction.

B. Williams has not shown and cannot show that a federal question was adjudicated below as the decision of the Texas Supreme Court rested solely on state law.

The Third Court of Appeals sets out the basis for its reversal of the trial court's judgment for Petitioner at

pages 6-10 of its opinion (Appendix B to Petition). Because a construction of Williams' contract to require "cause" for its termination "formed an impermissible restraint on the city council's governmental functions" (p. 10), the construction urged by Petitioner would render the contract void *ab initio*. A Texas governmental body retains exclusive control over governmental functions and any effort to contract them away is unconstitutional and void. *Clear Lake City Water Authority v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 391 (Tex. 1977).

The Court of Appeais does not address any federal question, because it was not presented with any. Brief in Opposition, App. 1-9. Its reversal of the trial court judgment rests exclusively on Texas law. Petitioner did not raise the contracts clause argument before the Texas Supreme Court (*see* Brief in Opposition, Appendices D and E), and the Supreme Court's denial of Petitioner's Application for Writ of Error by implication can only be based on Texas law. In fact the construction of Petitioner's employment contract, to give it effect rather than to void it, suggests that there has been no impairment of the contract.

II.

Article I, Section 10, clause 1's prohibition on a State's passing of laws which impair the obligation of contracts is not implicated in this case in that the Texas courts' construction of William's employment contract with the City of Granite Shoals made the contract possible of performance instead of void as violating public policy.

For the reasons stated in Section I, B. *supra*, Petitioner's contract has not been impaired but instead has been given effect and made possible of performance by the Texas courts. It should be further noted that a governmental entity created by the state has the power, within the constraints of the State Constitution, to create or abolish public offices, as well as to change the duties of such offices and shorten or lengthen the terms of office where the performance of governmental functions is concerned. Texas law provides that both the hiring and the firing of city employees is a governmental function, *City of Dallas v. Moreau*, 718 S.W.2d 776, 779 (Tex. App. – Corpus Christi 1986, writ ref'd n.r.e.), as well as is the operation of a police department, *Cronen v. Nix*, 611 S.W.2d 651, 653 (Tex. Civ. App. – Houston [1st Dist.] 1980, writ ref'd n.r.e.). This fundamental authority of governmental entities has long been recognized by this Court despite challenges based on the contract clause contained in Article I of the United States Constitution. *Higginbotham v. City of Baton Rouge, La.*, 306 U.S. 535, 539 (1939).

III.

Article I, Section 10, clause 1 of the United States Constitution (the "contract clause") is not implicated where no legislation has been enacted after the date of formation of a contract.

IV.

Article I, Section 10, clause 1 of the United States Constitution (the "contract clause") is not implicated where the contract is impaired not as a result of legislation but by judicial interpretation of the terms of the employment contract to make it possible of performance.

The facts of this case show that Petitioner does not suggest that any legislation was enacted after the formation of his employment contract with the City of Granite Shoals. Rather, Petitioner suggests that the construction of his contract to give it effect and to make it possible of performance under settled Texas law somehow violates the contract clause. Petitioner has presented the following question to this Court: "Whether the laws of Texas, *as interpreted by the state courts*, violate Article I, Section 10 of the United States Constitution."

In dismissing for want of jurisdiction the Petition in *New Orleans Waterworks Company v. Louisiana Sugar Refining Company*, 125 U.S. 18 (1887), this Court recognized that there is no jurisdiction where a contract clause impairment is suggested unless a contract has been impaired by a law of a State, as opposed to " . . . the decisions of its courts, or the acts of its administrative or executive boards or officers, or the doings of corporations or individuals." *Id.* at 30. Petitioner's complaint relates exclusively to the construction of the Texas courts which

gave effect to his employment contract by construing it not to require "cause" for termination. His complaint is not that any legislation was enacted following formation of the contract, but is rather with the construction accorded by the courts of Texas to give the contract effect.

This Court has recognized that one legislative body cannot by contract limit the powers of a successor legislative body or enter into contracts which "bargain away" the police powers of a State. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977). Further, it recognizes that laws in existence at the time a contract is entered into are read into the contract as are the "essential attributes of sovereign power". *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 435 (1934). The holding of the Texas Court of Appeals for the Third District acknowledges no more and no less. The governmental function at issue in this case is clearly one of the reserved powers of the State, being a governmental function. Petitioner's reliance on this Court's holding in *United States Trust Co. of New York v. New Jersey, supra*, is misplaced. There is no similarity in the factual circumstances of this case to that of the *Trustees of Dartmouth College v. Woodward*, 4 U.S. (4 Wheat. 518) 461 (1819) which involved legislation enacted subsequent to the grant of a charter which legislation materially altered the charter.

Petitioner does not complain of any law enacted by The City of Granite Shoals or any other legislative body which impaired his contract. Without such, the contract clause is not implicated, and no jurisdiction exists to review the decision of the Texas Supreme Court in denying Petitioner's Application for Writ of Error from the

Third Court of Appeals' holding reversing the judgment of the trial court in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DIANE C. VAN HELDEN
BARISH & VAN HELDEN
Attorneys at Law
1409 West Sixth Street
Austin, Texas 78703
(512) 477-9058
(512) 477-9061 (telecopier)

Attorneys For Respondent
The City of Granite Shoals, Texas

App. 1

NO. 03-93-00263-CV

IN THE

COURT OF APPEALS

FOR THE

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

AT AUSTIN

THE CITY OF GRANITE SHOALS,

Appellant

VS.

HERMAN WILLIAMS,

Appellee

BRIEF FOR APPELLEE

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW, Herman Williams, Appellee, and would show the Court the following:

I.

NATURE OF THE CASE

This is a suit for breach of a ten year employment contract. Plaintiff pled other claims as well. Motion for Summary Judgment by Defendant was granted as to the action for liable [sic] against the city and two of the three

individual Defendants and as to wrongful reprisal for a justified workers compensation claim. There was no dismissal of Plaintiff's claims for violation of due process against all Defendants'[sic], and the action of the trial court in refusing to submit issues on "due course of the law of the land" which Plaintiff tendered in substantially correct form is presented to this court in the form of a cross-point.

APPELLEE'S COUNTER-POINTS OF ERROR

COUNTER-POINT OF ERROR NO. 1

THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO BECAUSE ORDINANCE 35 ITSELF WAS INVALID, AND IN THE ALTERNATIVE DID NOT APPLY TO THE CONTRACT IN QUESTION.

(SF 391-392, 103-104, 118-122, 124-125, 156, 195-196)

COUNTER-POINT OF ERROR NO. 2

THE TRIAL COURT CORRECTLY FOUND THE EMPLOYMENT CONTRACT IS AMBIGUOUS.

(SF 96, 99, 115, 272, 380, 383, 384, 469, DX 2, PX 6, PX 10, PX 15)

COUNTER-POINT OF ERROR NO. 3

THE TRIAL COURT CORRECTLY ENTERED JUDGMENT ON THE JURY VERDICT AND DENIED DEFENDANT'S MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO BECAUSE TESTIMONY OF

THE CITY ATTORNEY AND MAYOR AT THE TIME THE CONTRACT WAS ENTERED INTO ESTABLISHED CIRCUMSTANCES AROUND ENTERING THE CONTRACT

(PX 4, PX 6, PX 10; DX 5)

COUNTER-POINT OF ERROR NO. 4

THE TRIAL COURT CORRECTLY SUBMITTED THE ISSUE OF DAMAGES AND IN THE ALTERNATIVE ANY ERROR WAS HARMLESS BECAUSE ELEMENTS IN MITIGATION WERE INCLUDED IN THE FIGURES RETURNED BY THE JURY.

(SF 424-429)

COUNTER-POINT OF ERROR NO. 5

THE TRIAL COURT CORRECTLY ENTERED JUDGMENT ON THE JURY VERDICT AND DENIED DEFENDANT'S MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO BECAUSE THERE WAS A MERE SCINTILLA OF CREDIBLE EVIDENCE THAT CAUSE EXISTED FOR THE TERMINATION OF THE CONTRACT.

(SF 375-376, 503-504, 514-517; DX 8)

CROSS-POINT OF ERROR NO. 1

THE TRIAL COURT ERRORED IN REFUSING TO SUBMIT ISSUES REGARDING VIOLATION OF

App. 4

PLAINTIFF'S RIGHTS TO DUE COURSE OF THE LAW OF THE LAND UNDER THE TEXAS CONSTITUTION BECAUSE MORE THAN A SCINTILLA OF EVIDENCE WAS PRESENTED REGARDING SUCH VIOLATION.

(SF 498-499; PX 10)

App. 5

NO. 3-93-263-CV

IN THE

COURT OF APPEALS

FOR THE

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

AT AUSTIN

THE CITY OF GRANITE SHOALS,

Appellant

VS.

HERMAN WILLIAMS,

Appellee

MOTION FOR REHEARING

Margaret D. Kennedy
State Bar No. 11294400
316 W. 12th, Suite 307
Austin, Texas 78701
512/482-8300
Fax No. 512/482-8302

ATTORNEY FOR APPELLEE

Dated: March 14, 1994

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A. This court's holding that a city council cannot make a binding contract regarding a governmental function binding succeeding councils fails to consider the rule of law adopted by the Supreme Court in *City of San Antonio* case... 3

B. This court's finding that the contract in question purports to convey away the governmental powers of the city overlooks the powers retained by the city in the contract itself..... 4

C. The conclusion of this court that finds that the contract was terminable at will uses rationale from cases which were for an indefinite time as opposed to this one with a definite ending date 5

POINT OF ERROR NO. 2

THE COURT ERRED IN FINDING THERE WAS NO DUE PROCESS VIOLATION IN MR. WILLIAMS' TERMINATION 6

A. This court's holding that Granite Shoals Police Department Policy Manual Section 3.04.007 does not apply to Herman Williams overlooks Sections 1.00 and 3.03.002 which do clearly apply to all department personnel 7

B. This court's attention to the vote to terminate was directed by Appellant's brief on Page 4; hense [sic], this court should have knowledge from the record that § 22.077(b)'s requirement (of a 2/3 vote if notice is not given) was not met 7

C. Since Herman Williams did have a contract of some type, he did have a property interest in his employment and a right to expect that sections of the Police Department Policy Manual which did apply to him would be used..... 8

Prayer 8

Certificate of Service 9

No. _____

IN THE
SUPREME COURT OF TEXAS

HERMAN WILLIAMS
Petitioner

v.

THE CITY OF GRANITE SHOALS
Respondent

APPLICATION FOR WRIT OF ERROR

KENNEDY & ASSOCIATE

Margaret D. Kennedy
316 W. 12th Street, Suite 307
Austin, Texas 78701
(512)482-8302
Fax No. (512)482-8302

TO THE SUPREME COURT OF TEXAS:

NAMES OF ALL PARTIES

PETITIONER: Herman Williams, represented by Margaret D. Kennedy of Kennedy & Associate, 316 W. 12th Street, Suite 307, Austin, Texas 78701. Herman Williams was Plaintiff and Appellee.

RESPONDENT: The City of Granite Shoals, represented by Diane C. Van Helden of Barish & Van Helden, 1409 West Sixth Street, Austin, Texas 78703. The City of Granite Shoals was Defendant and Appellant.

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B. The City did not contract away the free exercise of its governmental powers 8

C. The court of appeals opinion goes beyond the holding of this and other courts, and places an unfair burden on all municipalities 13

II. The court of appeals erred in finding that there was no due process violation in Williams' termination 14

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B. Williams' termination violated section 22.077(b) of the Texas Local Government Code and the court of appeals was pointed to the section of the statement of facts showing the violation 17

C. Any notice of hearing Williams received was insufficient for due process purposes.. 19

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